Nos. 15516-15519

United States Court of Appeals

For the Ninth Circuit

EITH C. MORTON, *Appellant,*

vs.

ORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Appellee.*

OBERT E. KUNTZ, *Appellant,*

vs.

ORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Appellee.*

ENE A. PICOTTE, *Appellant,*

vs.

ORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Appellee.*

OHN W. MAHAN, *Appellant,*

vs.

ORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Appellee.*

Reply Brief of Appellant

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INTRODUCTORY MATTERS

In this reply brief it is not our purpose to consider in etail each of the arguments presented in the brief of the ppellee Railway Company. Our purpose is to present as riefly as possible a demonstration of the basic flaw con-

tained in those arguments and the matter hereinafter pre sented is intended to relate to appellee's entire brief an argument.

Before proceeding, it should again be pointed out tha these causes are in no way related to nor controlled b Russell vs. Texas Company, 238 Fed. (2d) 636, certiorar denied June 24, 1957, 77 Sup. Ct. 1400. That case wa concerned solely with the applicability of the settlemen and preemption proviso upon which the appellants rel to lands which were then the primary or place lands c the appellee Railway within the State of Montana orig inally provided for by the Act of July 2, 1864 (Chapte 217, 13 Statutes 365). There was no occasion in that cas for any consideration of the applicability of the proviso t lands located within the second indemnity belt provide for by the Resolution of May 31, 1870 (Resolution 67, 1 Stat. 378) as divorced from the applicability of the pro viso to the entire grant. The decision of this Court in tha cause could not and did not dispose of the issues here pre sented. We are concerned here with lands which could nc have been acquired by the Railway Company save and ex cept for the passage of the aforementioned Joint Resolutio This being so, a decision to the effect that the settlemen and preemption proviso of the Joint Resolution did nc apply to the entire grant as contained in both the Resolu tion and the Act of 1864 has no bearing upon the issue here presented.

The arguments of the appellee Railway Company in it

rief are most succiently summarized in those two para-raphs appearing on pages 3 and 4 of the appellee's brief eading as follows:

> "We respectfully submit that the judgments should be affirmed for the reason that no lands, either place or indemnity, were granted in Montana to appellee by the later act of 1870, that the only lands which were granted to appellee by the Act of 1870 were additional lands between Portland and Puget Sound to subsidize construction of the new line. The source and origin of the title to all lands in Montana was the Act of 1864.
>
> In addition, we respectfully submit that when, in the later Act of 1870, Congress restricted the settlement and preemption proviso to 'all lands hereby granted,' it intended or contemplated only the new lands granted between Portland and Puget Sound, and did not contemplate any land in Minnesota, North Dakota, Montana, Idaho, or Western Washington, all of which were acquired under and by virtue of the Act of 1864."

ARGUMENT

Analysis of the Granting Acts and Previous Decision Relied Upon by Appellee

In order to completely understand the previous decions of the Supreme Court and the Department of the Interior upon which counsel for the appellee rely, it is necesary that the Act of 1864 and the Resolution of 1870 be nalyzed rather carefully with reference to the difference etween the lands within the place limits and the indem-

nity lands. The lands within the place limits have fre quently been referred to as lands granted in praesenti, titl to which vested in the Company as of the date of the Grant ing Act, whereas the lands within the indemnity limit were lands acquired by the Company by selection to replac lands lost within the primary or place grant, title to whic could not be acquired by the Company until selection.

This analysis, while adequate for the purposes of th cases previously decided, is not entirely accurate. It woul perhaps aid in understanding the problem involved to se out at this point a portion of Section 3 of the Act of 186 reading as follows:

> "And be it further enacted, That there be, and here by is, granted to the 'Northern Pacific Railroad Com pany', its successors and assigns, * * * every alter nate section of public land, not mineral, designated b odd numbers, to the amount of twenty alternate sec tions per mile, on each side of said railroad line, a said company may adopt, through the territories o the United States, and ten alternate sections of lan per mile on each side of said railroad whenever i passes through any state, and whenever on the lin thereof, the United States have full title, not reserved sold, granted or otherwise appropriated, and free fro preemption, or other claims or rights, *at the time th line of said road is definitely fixed, and a plat thereo filed in the office of the commissioner of the genera land office; and whenever, prior to said time, any o said sections or parts of sections shall have bee granted, sold, reserved, occupied by homestead settl ers, or preempted, or otherwise disposed of,* * * *

From the foregoing it can be seen that the statement of ounsel for the appellee appearing at page 5 of appellee's rief to the effect that the lands in place limits were never ubject to settlement or preemption except by appellee whereas indemnity lands on the other hand were at all mes subject to settlement and preemption until selected incorrect.

In St. Paul & Pac. R. C. vs. N. P. R. Co., 11 Sup. Ct. 389, 39 U.S. 1, 35 L. Ed. 77, we find the following statement:

> "The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as are specifically reserved. It is in this sense that the grant is termed one in praesenti;* * *."

Thus it can be seen that the problem preventing imediate passage of title upon passage of the act was a roblem of identification. That problem likewise preented immediate withdrawal of the place lands from setement and preemption upon the passage of the Act. As the place lands that problem ceased to exist at the time f definite location of the road. At that time the lands ithin the place limits were identified.

See also in this connection Van Wyck vs. Knevals, 106 . S. 360, 16 Otto 360, 27 Law Ed. 201, quoted from at ages 16 and 17 of our original brief herein as follows:

"The grant is one in praesenti, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it, arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed.' When that route is thus established, the grant takes effect upon the sections by relation as of the date of the Act of Congress.'

At page 20 of our original brief we pointed out that the lands within the indemnity belt as distinguished from the place lands were incapable of identification until such time as a deficiency became apparent in the place lands and the Company made a selection to replace the deficiency and we there cited and quoted from Atlantic & Pac. Railroad Co., Santa Fe Pac. Railroad Co., and Green Cattle Co., Inc., 58 Land Decisions 577, as follows:

"*The right of the grantee in indemnity lands prior to selection has also been described as 'only a float which attaches to no specific lands until the selection is actually made* (Ryan v. Railroad Company, 99 U.S. 382, 386; Cedar Rapids, etc., Railroad v. Herring, 110 U.S., 39), *or as a right to no land capable of identification by any principles of law or rules of measurement.* Kansas Pacific Railroad Company v. Atchison, Topeka & Santa Fe Railroad Company, 112 U.S. 414, 421." (Emphasis supplied).

Thus it can be seen that the problem with respect to both classes of land was a problem of identification solved

the case of the lands in place by definite location of the ilroad and as to the indemnity lands by selection.

We pointed out in our original brief that the cases re-ed upon by the court below as demonstrating that the nguage "hereby granted" employed in the settlement and reemption proviso could only be applied to the place lands anted by the Resolution of 1870 were cases dealing with is problem of identification as created by the words ereby granted" as used in Sections 3 and 6 of the Act 1864 and with reference to controversies arising over e rights of the railroad in the lands in the indemnity lts prior to selection by the Railroad Company of those nds. In its brief the appellee again relies upon these ses. This is particularly true of Hewitt vs. Schultz, 21 pt. Ct. 309, 45 L. Ed. 463, 180 U. S. 139, and of South-n Pacific vs. Bell, 22 Sup. Ct. 332, 183 U. S. 679, 46 Ed. 386 which cases are cited by counsel for the appellee der the heading "Decisions Reflecting That the Restric-ve Language of the Resolution of 1870—'All Lands Here-Granted'—Did Not Contemplate Land in Montana." e Hewitt case dealt with the controversy between Hewitt o had homesteaded lands within the indemnity belt ior to selection and Schultz who purchased from the orthern Pacific which asserted ownership by reason of the t. The same situation in effect was involved in the uthern Pacific case and neither of these cases supports in

the least the proposition that the Congress was as precise in the choice of its language as the appellee would have us believe when it employed the same words "hereby granted" in the settlement and preemption proviso as had been employed in Sections 3 and 6 of the Act of 1864.

While we, counsel for the appellee and some of the previously decided cases have spoken of selection under the supervision of the Secretary of the Interior as necessary to passage of title to the Company insofar as the indemnity lands are concerned, in other words, to solution of this problem of identification, that position is not entirely correct. In U. S. vs. N. P. 41 Sup. Ct. 439, 256 U.S. 51, 65 L. Ed. 825, we find the following discussion which is of considerable assistance in understanding the problem:

> "The provision relating to indemnity lands *was as much a part of the grant* and contract as the one relating to land in place (Payne v. Central P. R. Co. 255 U.S. 228, ante, 598, 41 Sup. Ct. Rep. 314), and it is apparent from the granting act and resolution that 'it was the purpose of Congress in making the grants to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits.' Weyerhaeuser v. Hoyt, 219 U. S. 380, 387, 55 L. Ed. 258, 261, 31 Sup. Ct. Rep. 300 * * *.
>
> When the grant was made by the act and resolution it was thought that the indemnity limits, as therein defined, contained lands largely in excess of what would be required to supply losses within the place limits.

and hence the provision in Sec. 6 under which, as construed by the land officers and this court, all lands in the indemnity limits were to be and remain subject to the operation of the Preemption and Homestead Laws, save as the odd-numbered sections should be taken out of their operation by indemnity selections. Under that provision, however, the lands available for indemnity were diminished much more rapidly than was expected; but as the provision was one of the terms of the grant, the company must submit to whatever of disadvantage results from it. This the company frankly recognizes, for in its brief it says: 'It was a part of our contract that, until selected, lands within the indemnity belt should be open to settlement under the Homestead and Preemption Laws;' and also: 'The question here is not whether, in the face of the deficiency, the settler (before selection) may acquire rights superior to ours, for we concede that he may.' But that provision gives no warrant for thinking that, after the company has earned the right to receive the lands comprehended in the grant, the government is free to reserve or appropriate to its own uses lands in the indemnity limits which are required to supply losses in the place limits. We say 'required' because we perceive no reason to doubt that lands in the indemnity limits may be so reserved or appropriated where what remains is sufficient to satisfy all the losses.

While it often has been said that, under such a grant, no right attaches to any specific land within the indemnity limits until it is selected, an examination of the cases will show that this general rule never has been applied as between the government and the grantee where the lands available for indemnity were not

sufficient for the purpose. Its only application has been where either the rights of settlers were involved or the lands available for indemnity exceeded the losses, thereby making it essential that there be a selection *and identification* of the particular lands sought to be taken. This distinction is illustrated in St. Paul & P. R. Co. v. Northern P. R. Co. 139 U.S. 1, 35 L. Ed. 77, 11 Sup. Ct. Rep. 389. The question there presented was whether there was any need for a selection where no right of a settler was involved and the lands available for indemnity were not sufficient to supply the losses. By reason of this insufficiency it was ruled that the lands in the indemnity limits necessarily were appropriated to satisfy the losses, and that no selection was required. The court said, p. 19: 'As to the objection that no evidence was produced of any selection by the Secretary of Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, *for they were all appropriated.*' * * *

One of the regulations of the Land Department requires that indemnity selections be accompanied by a specification—tract for tract—of the losses on account of which they are made. But that Department holds that this regulation does not apply where the losses exceed the lands which may be taken as indemnity. Thus, in Re Hastings & D. R. Co. 19 Land Dec. 30 it was said by Secretary Smith: 'The object in establishing the rule was to prevent the possibility of one basis of loss being used for more than one selection. As

this grant is known to be deficient over 800,000 acres . . . the danger of a duplication of the losses does not exist; and the reason of the rule ceasing, the rule itself does not operate.' And a similar ruling is found in Chicago, R.I. & P. R. Co. v. Wagner 25 Land Dec. 458, 460, and other cases.

Giving effect to all that bears on the subject, we are of opinion that after the company earned the right to receive what was intended by the grant, it was not admissible for the government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits. Of course, if it could take part of the lands required for that purpose, it could take all, and thereby wholly defeat the provision for indemnity. But it cannot do either. The 'substantial right' conferred by that provision (Weyerhaeuser v. Hoyt, supra) cannot be thus cut down or extinguished (Sinking Fund Cases, supra)." (Emphasis supplied).

The foregoing discussion re-inforces our position that the construction by the courts of the words "hereby granted" appearing in Sections 3 and 6 of the Act of 1864 arose by reason of this problem of identification which required different treatment in connection with withdrawal of the indemnity lands as opposed to the place lands. It likewise illustrates that when the problem of identification disappears the distinction between place lands and indemnity lands which arose by reason of that problem likewise disappears.

We have pointed out that this problem does not exist with respect to the construction of the language employed

in the preemption proviso of the Joint Resolution of 1870. The proviso did not go into effect until five years after the completion of the entire road. At that time there would be no problem of identification as the precise sections of the place lands granted by both the Act and the Resolution are determinable upon definite location of the railroad. At this time, of course, the sections of place land lost to the grant would become apparent and the railroad would immediately be entitled to select from the indemnity land hence it is clear that five years after the completion of the road the grant would be determined and the company's title to both the place and indemnity land fixed. It seems obvious to us that the problem with respect to the construction of Sections 3 and 6 of the Act of 1864 does not apply in connection with the construction of the proviso in the Joint Resolution.

We do not propose to discuss separately each of the decisions cited and relied upon by counsel for the appellee. Suffice to say that they are concerned either with the problem of withdrawal hereinbefore discussed or, as was true for instance of N. P. vs. McRae, 6 Land Dec. 400, and U. S. vs. N. P. Railroad Co., 14 Sup. Ct. 598, 152 U. S. 284, 38 L. Ed. 443, with the problem of whether or not the company acquired a new land subsidy by the Resolution of 1870. It is important to note that these latter cases for the most part present no discussion whatsoever concerning the nature of the provision of the Joint Resolution by which the second indemnity belt was created and

at none of those cases are concerned with the settlement ad preemption proviso. The only exceptions to this statement are U. S. vs. N. P., 1940, 61 Sup. Ct. 264, 311 U. S. 37, 85 L. Ed. 210 and Russell vs. N. P. R. Co., 238 Fed. (d) 636, Cert. Denied June 24, 1957, 77 Sup. Ct. 1400, which cases will be separately discussed hereinafter.

Legislative History

Commencing at page 8 of appellee's brief there appears a discussion of the legislative history of the Joint Resolution of 1870. Counsel for the appellee point out in effect that this legislative history reflected the sentiment that it would be immoral and unfair and in the nature of a breach of contract to attempt to apply the proviso to any except the new lands granted by the resolution. There is no support, however, in the material presented in the appellee's brief for their contention that the provisio should apply only to the new line of road and the new land subsidy between Portland and Puget Sound.

The debates and remarks set forth by counsel for the appellee illustrate a degree of reluctance to apply a proviso such as the one under consideration to the lands which were granted to the railroad by the provisions of the Act of 1864 but it must be remembered that the particular lands here involved could not have been acquired under the Act of 1864. It was only by virtue of the Joint resolution of 1870 that the Railroad Company became entitled to the lands here involved. Consequently the application

of this proviso to these lands could not in any way b considered as an interference with the previous grant. Co sider particularly the remarks of Senator Pomeroy set fort at page 10 of the Appellee's brief as follows:

> " 'If the Senator from California (Mr. Casserly) ha read carefully the amendment of the Senator fro Massachusetts he would have seen that all that is en braced in the new grant is put at $2.50 an acre * * * but I apprehend the Senator from California is to good a lawyer to suppose that he can make that app to a grant which already exists and that the compar have had in their possession rightfully for sever years. * * * It is a species of retrograde legislatio going backward. It is in the nature of violating contract, which is only a little less than an immorali whenever proposed by any legislative body. While (? Congress has power to do it, of course, I (do not? doubt; but it certainly has not the right to do it * * When that was not in the original act, it is too late t put it in now.' (Pages 2482-2483; we are uncertai of the accuracy of the language marked?")

The lands here involved were not included within ar grant already in the possession of the company. The com pany could not have acquired the lands here involve under the Act of 1864. There would therefore be no ob stacle either legal or moral to th application of the provis to the lands here involved. At this point we should pe haps point out that the amendment proposed by Mr. Wi son, considered at page 9 of the appellee's brief, whic was in the form of a limitation upon the company's rig to sell rather than a command to sell, was defeated.

What we have said concerning the proceedings in the Senate is, of course, equally true as to the proceedings in the House of Representatives .

Land Grant Case of 1940

We do not propose to belabor the arguments heretofore presented with reference to the interpretation of the opinion in U. S. vs. N. P. Ry. Co., 61 Sup. Ct. 264, 311 U. S. 317, 85 L. Ed. 210. Suffice to say that in that case the court did not hold that the proviso could not be applied to the lands within the second indemnity belt neither did it hold that the lands within the second indemnity belt were acquired by the railroad under the Grant of 1864. This holding, relied upon by counsel for the appellee, was as follows:

> "We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution *and not to the lands acquired under the grant of 1864.* We hold further that the company was not a trustee of the lands for the United States either in its own right or in behalf of possible settlers.. It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of the lands.* * *" (Emphasis supplied).

The discussion of this case presented by counsel for the appellee does not and cannot demonstrate that the court considered lands within the second indemnity belt as lands acquired under the Act of 1864. To pose the question is to

answer it for how could the lands within the second i demnity belt possibly be so considered? Without the Re ultion of 1870 those lands could never have been acquire There is no provision for them whatsoever in the Act 1864 and as the appellee has repeatedly pointed out the A of 1870 could not be considered an amendment to t Granting Act of 1864. See in particular the language N. P. Ry. Co. vs. DeLacy, 19 Sup. Ct. 791, 174 U. S. 622, L. Ed. 1111, quoted at page 25 of appellee's brief as f lows:

> "The defendant contends that the land in controve was excluded by operation of law from the grant 1864 by the resolution of May 31, 1870. Herein assumes that the effect of that resolution was to blot c the grant under the act of 1864. The resolution c not have that effect. It was not an amendment to t third section of the act of 1864 which granted t lands."

The language of the Supreme Court in the land grant c of 1940, quoted at pages 42 and 43 of appellee's brief, up which the appellee relies so strongly, is not concerned in a respect with the nature of the second indemnity belt. only concern was whether the company should be indem fied for lands lost to the Grant of 1870 by reason of the f that they had previously been acquired under the Grant 1864. The language there set forth can by no stretch of t imagination be considered support for the proposition th lands within the second indemnity belt were acquired un

Grant of 1864 which proposition is, we submit, an absurdity upon its face.

Insofar as Russell vs. N. P. Ry. Co., 238 Fed. (2d) 636, is concerned we have previously pointed out that that case was concerned with place lands under the Grant of 1864 and not with indemnity lands under the grant of 1870. We see no reason to consider that case further.

Positive Duty To Convey

Counsel for the appellee argue that the proviso is nothing more than a reservation by the United States of a power of disposition under the preemption and homestead laws and that only the United States could complain of a breach thereof. They point out that the Commissioner of the General Land Office took the position that there was no authority in the officers of the Land Department of the United States providing for the entry under any of the public land laws of lands which had been earned by the Railroad Company. Complete answer to the arguement of the appellee is found in the case of Oregon & C.R. Co. vs. U. S., 238 U.S. 393, 35 Sup. Ct. 908, 59 L. Ed. 1360, the very case cited by counsel for the appellee at page 49 of their brief. We have previously cited and quoted from that case but it is worthy of consideration again. We pointed out that in that case the proviso was a limitation upon the power of sale rather than a mandate to sell and the court in that case said further as to the nature of the proviso:

"By the acts of 1866 and 1870 it is provided that

upon the survey and location of the roads the gover ment shall withdraw from sale the granted lands, a the provision would seem to withdraw the lands fro the specific operation of the land laws, and certain from a complete analogy to them. The public la laws had test of the qualification of settlers under the they had also the machinery of proof and precautio When the granted lands were withdrawn from tho laws and primarily devoted to another purpose th were committed to another power, to be administer for such purpose, and a discretion in the exercise the power, within the restriction imposed, was nec sarily conferred." 59 L. Ed. 1395.

In this case and under the grants here involved the sit ation is similar. Here too the land was withdrawn fro the land laws and committed to another power for a ministration. However, the discretion vested in the Ra road Company in the grant involved in the Oregon & C. Co. case isn't present under the grant involved in this ca The proviso here required the Company to open the la granted by the resolution to preemption and settleme rather than simply limiting their power to sell.

We have already seen that by granting acts the lan were removed from the operation of the land laws a committed to another power for administration. The la laws no longer supplied the method and machinery which the lands could be settled. How else then could t lands be open for settlement and preemption at $2.50 p acre to be paid to the Railroad except by application the Railroad to purchase thereunder?

With reference to the argument that U.S. vs. N.P. Ry. ., supra, 61 Sup. Ct. 64, 311 U.S. 317, and the subse- ent decision in the district court, 41 Fed Supp. 273, posed of the issues here involved, counsel for the appel- ask how we could be entitled to relief when the fail- to open the lands granted to preemption and settlement s decreed to warrant a recovery by the United States. answer, we need only point out that there is nothing atsoever in that final decision to indicate that the $300,) compromise was related in any way to the failure of Company to open the land to settlement and preemp- n. The court provided in its decision:

> "8. This decree shall be and remain a full and complete adjustment, accounting and settlement of all the rights and claims of the United States against the Northern Pacific Railroad Company, Northern Pacific Railway Company, and any and all persons claiming by, through, or under them, or either of them, and of all the rights and claims of said Northern Pacific Railroad Company, Northern Pacific Railway Company, and any and all persons claiming by, through, or under them, or either of them, against the United States, which have been presented or might have been presented herein under and by virtue of the Act of Congress of July 2, 1864, and Joint Resolution of May 31, 1870, and any and all acts amending or supplementing the same, *as provided by the Act* of June 25, 1929." (Emphasis supplied) (41 F. Supp. 289-290).

We pointed out previously in our original brief the pro- ion of the Act of Congress of 1929 referred to above by

the court in the above quotation which reads as follows:

> " * * * and the passage of this Chapter shall n be construed as in anywise evidencing the purpose intention of Congress to depart from the policy of t United States expressed in the resolution of May 3 1870, relative to the disposition of granted lands said grantee, and the right is hereby reserved to t United States to, at any time, enact further legislati relating thereto." 43 U.S.C.A. 923.

Based upon the foregoing and upon our original br herein we submit that neither previous decisions nor leg lative history supply any support for the position of t appellee and that sound logic demands that the appell in this proceeding should finally be forced to honor t proviso of the Joint Resolution and that the appella should prevail.

The history of the provisos such as the one here i volved has been consistently a history of avoidance, evasi and almost contemptuous dismissal by the Railroad Co panys. If the obvious intent of the Congress is ever to honored, now and in this proceeding is the time and pla

Respectfully submitted,

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